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COURT OF APPEAL, FOURH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re E.D. a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

E.D.,

Defendant and Appellant.

D074731

(Super. Ct. No. JCM241285)

APPEAL from a judgment of the Superior Court of San Diego County, Aaron H. Katz, Judge. Affirmed as modified and remanded with directions.

Patrick Dudley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Christine Bergman and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

A petition was filed under Welfare and Institutions Code section 602 alleging that E.D. (the Minor) committed one count of identity theft (Pen. Code,¹ § 530.5, subd. (a)) and one count of misdemeanor impersonation of another person with intent to harm (§ 528.5, subd. (a)).

Following an adjudication hearing the court found both charges true. The court declared the identity theft count to be a misdemeanor. The Minor was placed on probation without wardship for a period not to exceed six months. The court rejected the Minor's contention that section 654 barred finding the maximum custody period would include four months for Count 2 and set the maximum period at one year four months.

The Minor appeals. She contends there was not enough evidence to support the identity theft count and that the court erred in finding punishment for Count 2 was barred by section 654.

Applying the proper standard of review, we find there is sufficient evidence in the record to support the trial court's findings. However, we agree with the Minor that section 654 bars separate punishment for Count 2. We remand with directions to modify the maximum custody period to one year. We affirm the balance of the judgment.

¹ All further statutory references are to the Penal Code unless otherwise specified.

STATEMENT OF FACTS

The facts of the offense are not in dispute. The parties stipulated to the facts regarding the Minor's conduct. It is the interpretation of the facts that the parties dispute.

The Minor, a 12-year-old girl, apparently had a poor relationship with her middle school teacher. The Minor set up an Instagram account in the teacher's name and posted a variety of images, statements and videos on that account. The court found the activity involved use of the teacher's identity in an unlawful manner and that she impersonated the teacher in the postings on the account.

The adjudication hearing began with a "Joint Statement of Facts" which was read into the record as a stipulation as follows:

"On December 20, 2017, Rancho Minerva Middle School Assistant Principal [T.D.] received a 'Student Worrisome Online Behavior Report' from the school district flagging a publicly available Instagram account in the name of a teacher. The profile photograph associated with the account was of Rancho Minerva Middle School teacher [T.P.] Underneath the profile picture was a caption that said, 'I'm a teacher at Rancho Minerva Middle.' Other than this, the account did not contain anything directly indicating it was controlled by [T.P.]

"[T.P.] confirmed the account was fraudulent and stated the profile photo belonged to her private Facebook account. [T.P.] also stated she never gave anyone permission to use the photograph or create an Instagram account on her behalf. During an investigation of the account, it was discovered the Instagram profile was created and maintained by [E.D.]

"On April 5, 2018, Minor wrote an apology letter and gave it to [T.P.] In the letter, Minor apologized for creating the account, claiming it was a joke."

After the joint statement of facts was read into the record, the prosecution and defense also entered stipulations to the following facts:

"Number one, it is hereby—it is hereby stipulated to, by, and between the parties that, number one, the person before the Court for adjudication is minor [E.D.] Two, between April 21st, 2017, and September 23rd, 2017, [E.D.] willfully obtained [T.P.]'s personal identifying information. Three, [E.D.] used [T.P.]'s personal identifying information without consent.

"Four, minor [E.D.] knowingly impersonated [T.P.] through a profile on a social networking internet website, to wit, Instagram. Number five, the Instagram posts submitted during the course of the adjudication fairly and accurately represent the posts made by minor [E.D.] between April 21st, 2017, and September 23rd, 2017. Six, the events in this case all took place within the county of San Diego."

The only witness who testified at the adjudication hearing was T.P. a middle school teacher. T.P. said the Minor had been a student in one of her classes. She said their relationship was not good, that the Minor had harassed her and treated her poorly. T.P. found the postings made by the Minor to be offensive. She worried that the postings on the Instagram account could result in her losing her job at the middle school.

DISCUSSION

I

Identity Theft

The Minor contends there is not enough evidence to support a finding of the use of the victim's identity for an unlawful purpose. The Minor admits doing all the acts alleged, but she denies she did them for a prohibited purpose. Contrary to the inference of a harmful purpose on her part drawn by the trial court, the Minor argues we should

draw a contrary inference, that is, we should infer she intended the acts as a joke or constitutionally protected "satire" in the exercise of her First Amendment rights. We note, as argued by the People, the Minor did not post the "satire" under her own name, but instead posted it on an account for which the victim was identified as the owner. We decline to weigh the evidence and make credibility decisions. That is the role of the trial court.

A. Legal Principles.

When we evaluate a claim of insufficient evidence, we apply the familiar substantial evidence standard of review. Under that standard, we review the entire record, drawing all reasonable inferences in favor of the trial court's decision. We do not weigh the evidence or make credibility decisions. Our role is to determine if there is enough, substantial evidence to support the trial court's decision. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Johnson* (1980) 26 Cal.3d 557, 575-578.)

In order to prove a violation of section 530.5, the prosecution must establish: "(1) that the person willfully obtain[ed] personal identifying information belonging to someone else; (2) that the person use[d] that information for any unlawful purpose; and (3) that the person who use[d] the personal identifying information do so without the consent of the person whose personal identifying information is being used." (*People v. Barba* (2012) 211 Cal.App.4th 214, 223; § 530.5, subd. (a).)

On the record before us, the Minor does not dispute that she willfully used personal identifying information of another without the person's consent. The only question remaining in the analysis of the sufficiency of the evidence is whether the acts

of posting the material at issue here falsely using the victim's identity as the author was done for an unlawful purpose. We will focus then on the element of purpose.

The "unlawful purpose" required for identity theft does not require a criminal objective on the part of the perpetrator. Intentional commission of a civil tort such as libel is a sufficient "unlawful purpose" to satisfy the statute. (*In re Rolando S.* (2011) 197 Cal.App.4th 936, 941-942, 944-946; *People v. Johnson* (2012) 209 Cal.App.4th 800, 818.) The trial court made a factual finding that the Minor's purpose in setting up the false posting was libel.

Civil Code section 45 defines libel as " 'a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.' " (*In re Rolando S.*, *supra*, 197 Cal.App.4th at pp. 946-947.)

B. Analysis

There is no question in this case that the Minor willfully appropriated the teacher's identity and prepared the Instagram postings in the teacher's name. The postings were offensive, sexual, racist, and violent images, purporting to be posted by the teacher. They placed the teacher's occupation in jeopardy as they were noticed by and reviewed by the school district. The materials were plainly represented to be the teacher's actions and views.

The record establishes the Minor and the teacher had a difficult relationship, which had involved harassment and poor treatment of the teacher by the Minor. The court specifically found the Minor's purpose was to commit libel.

The Minor urges us to draw a different inference. She contends her materials were childish and merely amounted to a joke or protected satire. We decline to draw such inference. Our task is to review the record drawing all reasonable inferences in favor of the trial court's decision. (*People v. Johnson, supra*, 26 Cal.3d at pp. 575-578.) Even if we wanted to draw a contrary inference, there is no basis for the inference the Minor seeks to establish. She did not post "humorous" material in her own name, and there is no testimony or stipulated facts that would indicate these postings, which are certainly strange, were intended as a joke or some form of protected satire. The trial court's finding of an unlawful purpose for the appropriation of the victim's identity is supported by substantial evidence. The true finding of identity theft by the Minor will be affirmed.

II

Section 654

At the disposition hearing, the Minor argued that potential punishment for count 2, a violation of section 528.5, subdivision (a), false personation, was barred by section 654. The court disagreed stating: "[t]here was some question that the Court had regarding whether or not Count 1 and Count 2 . . . fall within 654, but I do find that they are. While it does involve the same . . . transaction, they certainly are different crimes, so therefore, I think the appropriate maximum period of confinement would be one year, four months." We disagree with the court's analysis. While the statutes are different crimes, in this case, the violations of those statutes arose in a single course of conduct with a single objective, to post defamatory material about the teacher. On the facts before us, the identity theft in count 1 could not take place without falsely impersonating the teacher. There is absolutely no evidence of a separate act or objective in the record before us.

Section 654 precludes punishment for two offenses arising from the same act. The section also applies where there is a course of conduct that violates multiple statutes. Whether the conduct is divisible into separate acts depends on the intent and objective of the defendant. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

The People argue the trial court's comments amount to an implied finding of separate acts or purposes for the two offenses. We do not read the court's comments as addressing intent or purpose of the Minor in committing the two offenses. At best, the court found the two statutes were different crimes, as indeed they are. However, the court made no comments about potential separate intents or purposes.

Ordinarily, we give deference to the trial court's factual findings where they are supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) In this instance, there is simply nothing in this record to suggest any separate purposes for the violations of both statutes. The record shows only the single purpose of posting libelous material in the teacher's name. The Minor had to violate both statutes to commit her chosen offense. The court erred in imposing potential punishment for Count 2.

DISPOSITION

The disposition order is vacated, and the matter is remanded with directions to strike the potential custody for Count 2. As modified, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

DATO, J.

GUERRERO, J.